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**In the Supreme Court**  
**OF THE**  
**United States**

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OCTOBER TERM, 1977

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NO. **77-881**

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FRANK F. FASI, Mayor, City and County of Honolulu,  
FRANCIS A. KEALA, Chief of Police, Honolulu Police  
Department, City and County of Honolulu, and  
FRANCIS K. MATSUMOTO, Major, Honolulu Police  
Department, City and County of Honolulu,

Petitioners,

vs.

JAMES KAALAU KOA POKINI, aka James Akina, aka Poki,  
Respondent.

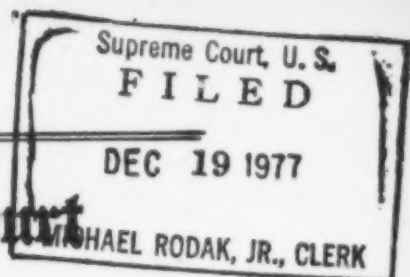
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**PETITION FOR A WRIT OF CERTIORARI**  
**to the United States Court of Appeals**  
**for the Ninth Circuit**

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BARRY CHUNG,  
Corporation Counsel  
JAMES E. ROSS,  
RANDOLPH R. SLATON,  
Deputies Corporation Counsel  
City and County of Honolulu  
Honolulu Hale  
Honolulu, Hawaii 96813  
Telephone: 808-523-4965  
Attorneys for Petitioners Fasi,  
Keala and Matsumoto

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## SUBJECT INDEX

	Page
Opinions below .....	1
Jurisdiction .....	2
Questions presented .....	2
Statutory provision involved .....	2
Statement of the case .....	3
Reasons for granting the writ .....	5
1. The Civil Rights Attorney's Fees Awards Act of 1976, improperly was relied upon in awarding attorney's fees since the compass of 42 USC Sec. 1983, incorrectly was expanded to impose liability upon Petitioners without a trial court determination of their fault or involvement and their due process rights thus were violated by such an interpretation ...	5
2. The ruling of the appellate court conflicts with the applicable decisions of this Court in that it permits penalties to be levied against municipal officials solely because of their official positions and not due to any fault or liability on their part ...	8
3. The retroactive application of the Civil Rights Attorney's Fees Awards Act of 1976, deprived Petitioners of the due process of law guaranteed them under the Constitution by assessing against them a severe penalty without an opportunity for a hearing on the merits .....	10
4. The case relied upon by the appellate court in deciding this suit is inapposite, and has been granted review by this Court; thus it would be inequitable to let the instant decision remain unexamined .....	12
Conclusion .....	14

## TABLE OF AUTHORITIES CITED

Cases	Pages
Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) .....	4, 10
Bloom v. Illinois, 391 U.S. 194 (1968) .....	11
Bradley v. Richmond School Board, 416 U.S. 696 (1974) .....	11, 12
Edelman v. Jordan, 415 U.S. 561 (1974) .....	8, 10
Goode v. Rizzo, 506 F.2d 542, <i>rev'd on other grounds</i> , 432 U.S. 362 (1976) .....	7
Hernandez v. Noel, 323 F. Supp. 779 (D. Conn. 1970) .....	9
In re Ayers, 123 U.S. 443 (1887) .....	9

	Pages
Monroe v. Pape, 365 U.S. 167 (1961) .....	8
Moor v. County of Alameda, 411 U.S. 693 (1973) .....	8
Paul v. Davis, 424 U.S. 693 (1976) .....	6
Pierson v. Ray, 386 U.S. 547 (1967) .....	7
Scheuer v. Rhodes, 416 U.S. 232 (1974) .....	7
Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969) .....	9
Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), <i>cert. granted</i> , 76-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3, 1977) .....	5, 7, 10, 12, 13
Sundry African Slaves v. Madrazo, 26 U.S. 110 (1828) .....	9
Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) .....	11
United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801) .	11
Wood v. Strickland, 420 U.S. 308 (1975) .....	7

#### Statutes

28 USC Sec. 1254(1) .....	2
42 USC Sec. 1983 .....	2, 3, 5, 6, 7
42 USC Secs. 2000a-3(b), 2000e-5(h), 3612 (c) .....	12
Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641 .....	2, 5, 10

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 Department, City and County of Honolulu, and  
 FRANCIS K. MATSUMOTO, Major, Honolulu Police  
 Department, City and County of Honolulu,

Petitioners,

vs.

JAMES KAALAUOKA POKINI, aka James Akina, aka Poki,  
 Respondent.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 29, 1977.

#### OPINIONS BELOW

The July 29, 1977, unreported opinion of the Court of Appeals appears in the Appendix, *infra*, at pp. 3-5. The prior order of the United States District Court for the District of Hawaii, dated July 7, 1975, appears in the Appendix, at pp. 1-2.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1977. A timely "Petition for Rehearing in Banc and Suggestion That Case Be Reheard in Banc" was denied on September 22, 1977; Appendix, at pp. 6-7. A "Motion to Stay Effect of Mandate Pending Application to Supreme Court for Writ of Certiorari" was sent to the Court of Appeals on October 11, 1977, but was not filed or considered. The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether municipal officials may be liable under a "no-fault" or *respondeat superior* theory for the payment of attorney's fees in an action brought under 42 USC Sec. 1983, when there has been no showing of liability or wrongdoing on the part of any official or subordinate.

2. Whether the imposition of attorney's fees against municipal officials based upon a "no-fault" or *respondeat superior* theory conflicts with prior decisions of this Court holding that municipalities may not be sued under 42 USC Sec. 1983.

3. Whether the Civil Rights Attorney's Fees Awards Act of 1976, is applicable retroactively to services rendered, or suits completed at the trial level, prior to its effective date.

(a) If so, whether such fees can be awarded when there has been no determination by the trial court of which party is the prevailing party.

(b) If so, whether there exists the right to a determination by a jury concerning whether such fees should be imposed, or the amount of such fees to be imposed.

## STATUTORY PROVISION INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, provides in relevant part:

"...[I]n any action or proceeding to enforce a provision of section ... 1979 [42 USC Sec. 1983] ... of the Revised Statutes, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.'"

## STATEMENT OF THE CASE

This suit was brought under 42 USC Sec. 1983, by which Respondent challenged his segregated confinement at the Halawa Jail, which at that time was operated under the auspices of the City and County of Honolulu. Respondent had been confined at the jail since June, 1972, after having been sentenced on numerous felony charges and while awaiting trial on other pending charges.<sup>1</sup> On certain of those charges, Respondent had been sentenced to life imprisonment.

Respondent was placed in temporary segregated confinement on February 25, 1974, as the result of anonymous threats against his life; that confinement afforded Respondent greater security and provided the means for that degree of observation necessary for his safety. Thus, segregated confinement was not the equivalent of the solitary confinement in which a prisoner might be placed for punitive reasons. Visitation privileges were accorded Respondent for the only weekend involved by Petitioner Matsumoto, the officer in charge of the jail, who also ordered that Respondent's full recreational privileges be restored at the beginning of the following week. One hour after he returned to the general prison population on March 5, 1974, Respondent threatened three times to kill his cellmate, and requested a single cell.

<sup>1</sup> Hawaii Criminal No. 44261 (Murder, 1st Degree); Hawaii Criminal No. 44262 (Robbery, 1st Degree); Hawaii Criminal No. 44324 (Robbery, 1st Degree); Hawaii Criminal No. 44263 (Murder, 1st Degree); Hawaii Criminal No. 44940 (Murder, 1st Degree); Hawaii Criminal No. 44325 (Robbery, 1st Degree).



Respondent then began to occupy a single cell again, the situation upon which he originally had based his suit.

Jurisdiction under 42 USC Sec. 1983, was predicated solely upon the absence of written rules and regulations delineating the specific procedures that would be followed whenever a change occurred in a prisoner's custodial status. Relying on the existing law regarding attorney's fees, Petitioners promulgated certain rules for the jail pursuant to an agreement entered into between the parties. The parties then incorporated into the final judgment rules that would be deemed to be a regular part of the administrative procedure of the jail; the judgment was filed in the United States District Court for the District of Hawaii on April 14, 1975. No showing ever was made that any Petitioner had deprived Respondent of any right, privilege or immunity; nor that any Petitioner had engaged in any wrongdoing or misconduct; nor that Petitioners Fasi and Keala had any connection with any activities involved in the suit other than their holding their respective positions as the Mayor of Honolulu and the Chief of Police of the Honolulu Police Department, who, under the municipal structure, were the superiors of Petitioner Matsumoto.

Later on April 14, 1975, counsel for Respondent filed a "Motion for Costs and Attorneys' Fees," in which he relied upon the "private attorney general" doctrine for the awarding of attorney's fees. Record on Appeal in *Forma Pauperis* to the United States Court of Appeals for the Ninth Circuit (hereinafter cited as R.), at 1. Subsequent to the filing of the motion, and prior to a ruling upon it, this Court denied the use of that theory in cases such as the instant suit, in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). Following that decision, Respondent submitted an "Amended Motion for Costs and Attorneys' Fees," based upon the "common benefit" theory. (R. at 33.) The District Court entered an order denying that motion on July 7, 1975. (R. at 46.) On August 1, 1975, Respondent filed his

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. (R. at 49.)

The final brief received by the Court of Appeals, the Reply Brief of Respondent, was submitted in February, 1976, some seven months prior to the approval on October 19, 1976, of the "The Civil Rights Attorney's Fees Awards Act of 1976," P.L. 94-559, 90 Stat. 2641 (hereinafter referred to as the Act). Before oral argument was set in the instant suit, the Court of Appeals ruled in *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977), cert. granted, 76-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3, 1977), that Congress intended that the Act apply to all cases pending at the time of its enactment. Relying on *Stanford Daily*, the Ninth Circuit ruled against Petitioners herein. A "Petition for Rehearing in Banc and Suggestion That Case Be Reheard in Banc" was filed timely by Petitioners; an order denying that Petition was filed on September 22, 1977. This Petition ensued.

#### REASONS FOR GRANTING THE WRIT

1. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, WAS RELIED UPON IMPROPERLY IN AWARDING ATTORNEY'S FEES SINCE THE COMPASS OF 42 USC SEC. 1983, INCORRECTLY WAS EXPANDED TO IMPOSE LIABILITY UPON PETITIONERS WITHOUT A TRIAL COURT DETERMINATION OF THEIR FAULT OR INVOLVEMENT, AND THEIR DUE PROCESS RIGHTS THUS WERE VIOLATED BY THAT INTERPRETATION.

The basic provisions of the Civil Rights Attorney's Fees Awards Act of 1976 (hereinafter cited as the Act), have not

been complied with in this proceeding. The Act permits the awarding of a reasonable attorney's fee in an action based upon 42 USC Sec. 1983, only when "the court, in its discretion," decides to award attorney's fees to "the prevailing party . . . ." Nowhere in the record of this action has there been a determination that Respondent is the prevailing party. The trial court did not even have an opportunity to decide whether to award such an attorney's fee since, in an ebullient exhibition of judicial tinkering, the Court of Appeals completely usurped the primary right of the trial court to make that determination after the passage of the Act. Furthermore, Petitioners never had an opportunity to argue that they were the prevailing parties. At no time during the pendency of this suit at the trial court level or during the period in which briefs were submitted to the appellate court could an attorney's fee have been awarded under the Act. Had this been possible, of course, different considerations would have been present that would have affected the strategy taken by Petitioners at the trial court level.

Petitioners in this action were sued in their official positions as the Mayor, the Chief of Police and the officer in charge of the Halawa Jail. Respondent sued solely on his own behalf and not as the spokesman for a larger group of inmates or prospective inmates. The only finding made by the trial court about the behavior of Petitioners was that Petitioners did not act in bad faith. (Order of July 7, 1975.) The record itself does not indicate that Petitioners participated in, had knowledge of, or were negligent with regard to any act that purportedly deprived Respondent of his rights, privileges or immunities under 42 USC Sec. 1983.

Notwithstanding the notable absence of the proof of Petitioners' involvement under color of state law that would be necessary to establish a violation of 42 USC Sec. 1983, *Paul v. Davis*, 424 U.S. 693 (1976), and notwithstanding a line of cases that would hold supervisory personnel liable only when that evidence was forthcoming, the Court of

Appeals imposed a form of strict liability or a theory of *respondeat superior* upon Petitioners by assessing against them the attorney's fees. The ultimate irony appears when it is learned that the prisoner was returned to the general prison population prior to any of the substantive actions in this case, and that the fees mainly were incurred after the prisoner was returned by his own request to the very status, segregated confinement, that he had contested by precipitating this litigation.

Holding Petitioners liable for attorney's fees under these circumstances is not equitable, and is contrary to a significant body of federal case law, as well as several hundred years of common law tradition, holding supervisory officers not strictly liable for the acts of their subordinates. See *Goode v. Rizzo*, 506 F.2d 542 (3d Cir. 1974), *rev'd on other grounds*, 432 U.S. 362 (1976). If Petitioners had been sued by Respondent for money damages under 42 USC Sec. 1983, they would have enjoyed a qualified immunity (especially when they have shown good faith), of which the precise parameters apparently have not been determined. *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967). Notwithstanding that immunity, which Petitioners never had an opportunity to assert, the Court of Appeals awarded against them expenses that are characterized as "costs," but that in reality are a punitive form of damages.

Liability under the theory of strict liability or *respondeat superior* espoused *sub silentio* by the Court of Appeals is infinitely expandable to include the imposition of attorney's fees on any person in any chain of command. Such a ruling serves ineluctably to decrease interest in government service. What reasonable citizen would want to serve as mayor of a city, if this ruling is upheld, when that person could be liable *personally* for the payment of attorney's fees for an alleged act of a police officer with whom he has had no contact and



of whose actions he has had no knowledge?<sup>2</sup>

This egregious defect in the lower court's decision justifies the granting of certiorari to review that ruling.

**2. THE RULING OF THE APPELLATE COURT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT IN THAT IT PERMITS PENALTIES TO BE LEVIED AGAINST MUNICIPAL OFFICIALS SOLELY BECAUSE OF THEIR OFFICIAL POSITIONS AND NOT DUE TO ANY FAULT OR LIABILITY ON THEIR PART.**

The decision by the Court of Appeals creates a precedent that conflicts with prior decisions of this court. In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that a municipal government is immune from a lawsuit brought under 42 USC Sec. 1983; *Moor v. County of Alameda*, 411 U.S. 693 (1973), extended that principle to county governments. These two cases, in conjunction with *Edelman v. Jordan*, 415 U.S. 651 (1974), make it reasonably clear that an award of attorney's fees that must be paid from city or county funds is not permissible. (Emphasis to this position in the present suit is supplied by the conspicuous absence of the City and County of Honolulu, which controlled the jail, as a party to the litigation.) The ruling of the Court of Appeals raises the problem whereby public officials become responsible for the payment of large sums of money, despite the absence of any finding of wrongdoing on their part and in direct contrast to a finding that they had not acted in bad faith, simply because of the positions they occupy in the municipal

<sup>2</sup>Unlike the situation in *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 25 (1973), *aff'd*, 550 F.2d 464 (1977), *cert. granted*, 76-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3 1977), Petitioners cannot seek solace from an ameliorative statute such as California Government Code, Sections 825, *et seq.*, in which a judgment against a public official would be paid by the governmental employer if that official acted within the scope of his duty.

structure.

Petitioners were held liable by the appellate court under the theory that merely by occupying administrative positions in an organizational structure, they assume personal responsibility for all activities of their subordinates. This, of course, is the novel declaration of a strict liability or *respondeat superior* theory of civil rights liability devised by the Ninth Circuit Court of Appeals. If the individual Petitioners are found to be liable solely because of their official positions and not because of any active or consenting participation in activities that presumably gave rise to Respondent's suit, then the Ninth Circuit decision essentially allows the City as a municipality to be liable for attorney's fees. See *In re Ayers*, 123 U.S. 443 (1887); *Sundry African Savas v. Madrazo*, 26 U.S. 110 (1828). (For Petitioners to be liable for the payment of any costs, they should have been sued personally, and not in their official positions, as they were here.) To allow this ruling to remain unexamined would result in the rationale of the above cases being vitiated through a tangential attack and would lead to the eventual eradication of those decisions.

It is no argument to state that such costs can be assessed in proceedings that seek mainly injunctive relief, in which monetary awards have been made on occasion.<sup>3</sup> An examination of those cases clearly reveals that the awards have been allowed against officials only when those officials had encouraged the alleged wrongdoing or had acquiesced in that wrongdoing after they had knowledge of its occurrence. In this proceeding, Petitioners had no notice of any wrongdoing, and the only possible wrongdoing was the absence of written rules concerning changes in custodial status. No finding was made of any unconstitutional, improper or wrong conduct on the part of any Petitioner. Finally, Petitioners moved imme-

<sup>3</sup>See, e.g. *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Hernandez v. Noel*, 323 F. Supp. 779 (D. Conn. 1970).

diately to improve the situation complained of by Respondent through the institution of written rules applicable to transfers within the jail.

The appellate court's ruling that permits the assessment of attorney's fees based solely upon the municipal structure conflicts with this Court's decisions and review of that judgment should be granted.

**3. THE RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1979, DEPRIVED PETITIONERS OF THE DUE PROCESS OF LAW GUARANTEED THEM UNDER THE CONSTITUTION BY ASSESSING AGAINST THEM A SEVERE PENALTY WITHOUT AN OPPORTUNITY FOR A HEARING ON THE MERITS.**

Prior to the trial court's decision on the question of attorney's fees, this Court ruled against the initial theory upon which Respondent had based his request for such fees. *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). While this case was on appeal to the Ninth Circuit and after all briefs had been submitted, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (hereinafter cited as the Act). Upon appeal, the Ninth Circuit held that the Act applied retroactively to this case, basing its decision upon its own ruling in *Stanford Daily v. Zurcher*, 550 F.2d 464 (1977), cert. granted, 70-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3 1977).

The Act does not specify that it would apply to cases such as this case in which all trial court proceedings had been completed when the Act was enacted, and in which an appeal had been taken regarding only the question of attorney's fees. Since the Act is straightforward and clear on its face, no resort should be made to legislative history. Furthermore, the legislative history does not state clearly that the Act should be applied in suits such as this. The Ninth Circuit relied upon its own legerdemain in determining which of the parties was the prevailing party, and then made its award of attorney's

fees by judicial fiat.

While these fees have been characterized as "costs," they should be examined for the effect of their imposition, not by the label placed upon them. Clearly, this assessment imposes a penalty upon Petitioners that is greater than any burden that could have been foreseen at the inception or the completion of this suit at the trial court level. Cf. *Edelman v. Jordan*, supra. The assessment of such substantial sums, so far in excess of the traditional concept of "costs," creates the need for Petitioners to have access to a trial by jury in order to determine the applicability of such an award. As this Court has determined that the right to trial by jury exists in certain cases of contempt, due to their serious nature, *Bloom v. Illinois* 391 U.S. 194 (1968), thus it also should determine that the same right exists in proceedings such as this suit.

The Act also requires that the award of attorney's fees must be made in the "discretion" of the court. Traditionally this concept has been applied to the power of the trial court to make certain determinations based upon its own perceptions and its immediate and primary familiarity with the case; it is not an authority vested in an appellate court that, of necessity, must rely solely upon the cold record. Ignoring this concept, the Ninth Circuit summarily awarded attorney's fees without granting to the trial court an opportunity to make the necessary determination with reference to the Act, and without permitting Petitioners an opportunity to argue their position in reference to the Act.

This Court held in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), that an appellate court should apply the statutory law in effect at the time its decision is rendered unless by doing so manifest injustice would result. A tripartite test that had been established in earlier cases, *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), is applied to determine whether that injustice would occur. The test examines "(a) the nature and



identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717.

When the instant case is examined with those criteria, manifest injustice clearly would result if the appellate decision is upheld. Petitioners have been sued in their official capacities as officers of the Honolulu Police Department and as the administrative head of the City and County of Honolulu. Respondent was a prisoner who had been placed in segregated confinement for his protection (as Petitioner Matsumoto had a duty to protect Respondent from any harm that might befall him during his incarceration), and who then later was placed in segregated confinement at his own request.

The alleged deprivation of Respondent's rights was the initial placing of Respondent in segregated confinement without the availability of written rules regarding that removal from the general prison population. Furthermore, the "right" allegedly involved did not reach the high level of those special rights that earlier had received Congressional attention in the awarding of attorney's fees. *See, e.g.* 42 USC Secs. 2000a-3(b) (public accommodations), 2000e-5(h) (employment), 3612(c) (housing). Any expansion of these select and important categories should be interpreted narrowly and not applied retroactively to parties who could not anticipate such a change.

The passage of the Act creates an intolerable burden upon Petitioners by imposing upon them a substantial penalty that must be paid personally, even though there has been no finding of liability or fault on their part. Such a situation is a paradigm of the manifest injustice that would occur should the Act be applied retroactively to this proceeding. *Bradley v. Richmond School Board, supra*, does not control this suit and the lower court's decision should be reviewed to correct this error.

**4. THE CASE RELIED UPON BY THE APPELLATE COURT IN DECIDING THIS SUIT IS INAPPOSITE, AND HAS BEEN GRANTED REVIEW BY THIS COURT; THUS IT WOULD BE INEQUITABLE TO LET THE INSTANT DECISION REMAIN UN-EXAMINED.**

Grave injustice would be done to Petitioners if this case remains unexamined while *Stanford Daily v. Zurcher, supra*, is reviewed by this Court. The likely reversal of *Stanford Daily*, the only case upon which the Court of Appeals relied in deciding this suit, would result in the anomaly by which the precedent case would be corrected while its progeny would remain as a legal grotesquery destined to be filed away, ignored and embarrassing, in a drawer of judicial quirks.

A perusal of the District Court opinion in *Stanford Daily v. Zurcher, supra*, which was adopted by the Ninth Circuit, 550 F.2d at 464, reveals the dissimilarities of that case when compared with this suit. There, the court treated the award of attorney's fees as a remedy that would effectuate a congressional policy. The basis for that rationale was that such an award vindicated important constitutional rights, supplemented otherwise inadequate remedies, was consistent with other congressional policies, and was appropriate because of the high social value placed upon the rights involved.

In this suit, the benchmark constitutional rights of the Fourth Amendment, which were involved in *Stanford Daily*, are not present. The remedies in the present suit were complete; they were not merely theoretical or remedies undertaken simply because of a "point of law." Moreover, unlike cases relied upon by the District Court in *Stanford Daily*, action was taken immediately by Petitioners even though it was not necessary to the resolution of the suit since Respondent already had been returned to the general population. Furthermore, the assessment of an attorney's fee against Petitioners would hamper effective action by public

officials since any action they might take would make them subject to strict and personal liability for any attorney's fees assessed in such cases despite no fault or liability on their part.<sup>4</sup>

Therefore, in order to prevent substantial injustice to Petitioners, review should be granted.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

DATED at Honolulu, Hawaii: December 1, 1977.

Respectfully submitted,

BARRY CHUNG,  
Corporation Counsel

JAMES E. ROSS,  
RANDOLPH R. SLATON  
Deputies Corporation Counsel  
Counsel for Petitioners

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<sup>4</sup>See n. 2, *supra*.

# APPENDIX

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

---

JAMES KAALAU KOA POKINI,  
aka James Akina, aka Poki,  
Plaintiff,

v.

FRANK F. FASI, Mayor,  
City and County of Honolulu, et. al.,  
Defendants.

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Civil No. 74-42  
Filed July 7, 1975

---

ORDER DENYING AMENDED MOTION  
FOR ATTORNEYS' FEES AND COSTS

The above-entitled Motion having come up for hearing on June 26, 1975 at 3:30 p.m. before the Honorable Samuel P. King, and the Court having found the reasonable value of the legal services rendered by Plaintiff's attorneys in the course of the above-entitled case to be \$5,000.00, and, further, that the Defendants did not act in bad faith during the course of said case;

IT IS HEREBY ORDERED that Plaintiff's Amended Motion for Attorneys' Fees and Costs herein shall be and is



hereby denied.

DATED: Honolulu, Hawaii, July 7, 1975

/s/ Samuel P. King /seal/  
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Dennis W. Potts  
DENNIS W. POTTS  
Attorney for Plaintiff

/s/ William M. Kahane  
WILLIAM M. KAHANE  
Attorney for Defendants

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAMES KAALAU KOA POKINI,  
aka James Akina, aka Poki,  
Appellant,

v.

FRANK F. FASI, Mayor, City and County of Honolulu,  
FRANCIS KEALA, Chief, Police Department, City and  
County of Honolulu, and FRANCIS K. MATSUMOTO,  
Officer in Charge, Honolulu Jail, City and County of  
Honolulu,

Appellees.

No. 75-3039  
Filed July 29, 1977

MEMORANDUM

Appeal from the United States District Court  
for the District of Hawaii.

Before: ELY, HUFSTEDLER, and WRIGHT, Circuit Judges

The appellant initiated an action under 42 U.S.C. § 1983 (1970), charging that the Halawa Jail administration had segregated him from other prisoners and had deprived him of

other standard rights and privileges without conducting a prior hearing. Following extended negotiations that can be inferred, the parties stipulated to a judgment under which the defendants agreed to adopt certain procedures governing the future transfer of prisoners. The appellant thereafter moved for attorneys' fees. The district court found that the appellant's attorneys had invested time and effort reasonably valued at \$5,000, but nevertheless denied the motion on the basis of the Supreme Court's then recent decision in *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). This appeal followed.

While the instant case was pending on appeal, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1974 (Act), Pub. L. No. 94-559, 90 Stat. 264 (1976), which modified *Alyeska* by adding the following language to 42 U.S.C. § 1988:

*"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."*

(Emphasis supplied.)

As previously noted, the District Court, at the time it decided the appellant's motion, did not have the benefit of this amendment, which was an explicit Congressional response to *Alyeska*.

Congress indisputably intended the Act to apply to cases, like this, pending at the time of enactment, and our Court recently has so held. *Stanford Daily v. Zurcher*, 550 F.2d 464, 465-66 (9th Cir. 1977). In these circumstances, and in

the light of the District Court's finding with respect to the value of services rendered by appellant's attorneys,<sup>1</sup> no useful purpose would be served in remanding to the District Court for purposes of deciding the impact of the Act as to attorney's fees in this case. Accordingly, the challenged Order is reversed, and upon remand, the District Court will allow to the plaintiff, as costs, the sum of \$5,000 for the services of his attorneys. Additionally, we hold that the appellant will be allowed, as costs, an additional \$1,000 for the services of his attorneys in connection with this appeal.<sup>2</sup>

Reversed and Remanded, with directions.

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<sup>1</sup> During oral argument, and in reply to a specific question put from the bench, counsel for the appellees agreed with the District Court's finding that the value of the services rendered to the appellant in the trial court was \$5,000. In a supplemental document filed by the appellees, it appears that their counsel is, in effect, attempting to renege on the concession. That, we will not permit.

<sup>2</sup> We called for supplemental statements as to the value of the appellate work done for appellant's attorneys. The appellant put forward a claim for an additional \$5,000, while the appellees, quite curiously, state that the services were worthless. The appeal was well-briefed for the appellant, but since the issue was relatively simple, we have concluded that an additional \$1,000, when considered with the \$5,000 award, is a fair allowance as to all parties.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

JAMES KAALAUkoa POKINI,  
aka James Akina, aka Poki,  
Appellant,

v.

FRANK F. FASI, Mayor, City and County of Honolulu,  
FRANCIS KEALA, Chief, Police Department, City and  
County of Honolulu, and FRANCIS K. MATSUMOTO,  
Officer in Charge, Honolulu Jail, City and County of  
Honolulu,

Appellees.

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No. 75-3039  
Filed Sept. 22, 1977

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ORDER

Before: ELY, HUFSTEDLER, and WRIGHT, Circuit Judges.

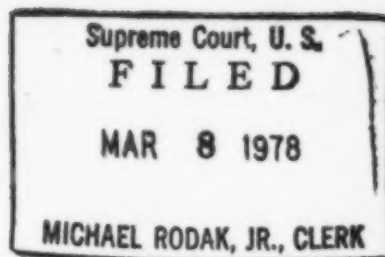
The judges constituting the panel originally concerned with the subject case (Ely, Hufstedler, and Wright), have unanimously voted to deny the Petition for Rehearing and to reject the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for rehearing en banc is rejected.





IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977  
No. 77-881

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FRANK F. FASI, Mayor, City and County of Honolulu,  
FRANCIS A. KEALA, Chief of Police, Honolulu Police  
Department, City and County of Honolulu, and  
FRANCIS K. MATSUMOTO, Major, Honolulu Police  
Department, City and County of Honolulu,

Petitioners,

vs.

JAMES KAALAUkoa POKINI, aka James Akina, aka Poki,

Respondent.

---

---

RESPONSE IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI

---

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DENNIS W. POTTS  
457 Alexander Young Bldg.  
Honolulu, Hawaii 96813  
Phone: 537-4575

Attorney for Respondent

## SUBJECT INDEX

	<u>Page</u>
Questions Presented . . . . .	1
Statement of the Case . . . . .	1
Reasons for Denying the Writ . . . . .	3
1. The Civil Rights Attorney's Fees Awards Act is Applicable to Pending Cases . . . . .	3
2. No Showing of Individual Fault or Bad Faith is Required . . . . .	5
3. The Act may be Applied to Local Municipalities. . . . .	5
4. The Granting of Certiorari in Stanford Daily v. Zurcher is not Significant. . . . .	6
Conclusion . . . . .	6

# TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) . . . . .	2, 3, 4, 5
Bradley v. Richmond School Board, 416 U.S. 696 (1973) . . . . .	3
Gates v. Collier, 559 F2d 241 (CA5, 1977) . . . . .	4
Gay Lib v. University of Missouri, 558 F2d 848 (CA8, 1977) . . . . .	4
Hodge v. Seiler, 558 F2d 284 (CA5, 1977) . . . . .	4
Rosado v. Santiago, 562 F2d 114 (CA1, 1977) . . . . .	4
Seals v. Quarterly County Court, 562 F2d 390 (CA6, 1977) . . . . .	4
Stanford Daily v. Zurcher, 550 F2d 464 (CA9, 1977) . . . . .	3, 6
Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) . . . . .	3
Wharton v. Knefel, 562 Fed 550 (CA8, 1977) . . . . .	4



<u>Statutes</u>	<u>Page</u>
42 USC § 1983 . . . . .	1, 3
Civil Rights Attorney's Fees Awards Act of 1976, P. L. 94-559, 90 Stat. 2641 . . . . .	1, 2, 3, 4, 5

<u>Others</u>	
122 Cong.Rec. H. 12166 (October 1, 1976) . . . . .	4
122 Cong.Rec. S. 17052 (1976) . . . . .	5
H.R. Rep. No. 94-1558, 9th Cong. 2d Sess. (1976) .	4
S. Rep. No. 94-1011, 94th Cong, 2d Sess. 1 . . . . .	5

IN THE  
SUPREME COURT OF THE UNITED STATES  
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vs.

JAMES KAALAU KOA POKINI, aka James Akina, aka Poki,

Respondent.

---

### QUESTIONS PRESENTED

1. Is the Civil Rights Attorney's Fees Awards Act of 1976 applicable to cases which are pending as of the date of its enactment?

### STATEMENT OF THE CASE

This action was initiated by Respondent pursuant to 42 USC § 1983 by virtue of his segregated confinement at Halawa Jail, but essentially to challenge the complete and total absence of any written rules, regulations or guidelines setting out the specific procedures to be followed whenever the jail administration sought to bring about a change in the custodial status of an inmate. As a result of this action and the negotiations between agents for the Petitioners and the Respondent's attorneys, written rules and regulations

governing such changes in custodial status and, in effect, protecting and enhancing the due process rights of all inmates at Halawa Jail were incorporated into the jail's administrative procedure.

Subsequently, Respondent moved for attorneys' fees pursuant to the then-viable "private attorney genera;" doctrine. In the wake of the decision in Alyeska Pipeline Service Co., v. Wilderness Society, 421 US 240 (1975) Respondent's motion was denied and he appealed to the United States Court of Appeals for the Ninth Circuit. Following the submission of briefs to the Court of Appeals the Civil Rights Attorney's Fees Awards Act of 1976, PL 94-559, 90 Stat 2641 (hereinafter referred to as "Act") was passed. When the Court of Appeals indicated its intention to reverse the district court's denial of attorneys' fees on the basis of the Act during oral argument held in Honolulu on June 6, 1977, it requested both sides to submit written statements relating to the amount of attorneys' fees which should be awarded to Respondent in the event of such a reversal. In response to this request Petitioners' attorney submitted a letter to the Court of Appeals dated June 27, 1977 ( a copy of which is appended hereto) during the course of which the specific request of the Court of Appeals was brushed aside and several new issues were injected into this case. These new issues were discussed on pages 2-5 of said letter and, as the record of this case will show, had never been raised or even discussed prior thereto. Thus, the first three reasons set out in support of the Petition for Certiorari were first raised in the course of this letter. As such, they have no place in the aforesaid petition.

#### REASONS FOR DENYING THE WRIT

##### 1. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT IS APPLICABLE TO PENDING CASES.

The Act provides in pertinent part:

"In any action or proceeding to enforce a provision of Section . . . 1979 (42 USC § 1983) . . . of the revised statutes . . . the court in its discretion may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs."

In the instant case the Act served as both a specific legislative response to Alyeska Pipeline Service Co. v. Wilderness Society, supra, and the basis for thb reversal of the district court's denial of Respondent's motion for attorneys' fees by the Ninth Circuit Court of Appeals. As the Act was passed while Respondent's appeal to the Ninth Circuit was pending, the Court of Appeals was faced with the question of whether the Act should apply to pending litigation. As in Stanford Daily v. Zurcher, 550 F2d 464 (CA9, 1977), the Court of Appeals decided that the Act should apply. In doing so it made a decision which finds overwhelming support in both the legislative history of the Act and the available case law.

The general rule of thumb, followed in Bradley v. Richmond School Board, 416 US 696 (1973) and Thorpe v. Housing Authority of the City of Durham, 393 US 268 (1969) is that retroactive application should be made except where "manifest injustice" would result or the legislative intend behind the new law is ambiguous. The claim of "manifest injustice" was raised in Bradley and this court nevertheless held that legislation authorizing attorney's fees in Title VI cases was retroactive and obviously found no manifest injustice in doing so. Similarly, in the instant case any claim of "manifest



injustice" is equally lacking in merit. Reasonable attorneys' fees were requested in the original complaint filed herein and, indeed, would have been granted by the district court under the "private attorney general" doctrine if the Alyeska Pipeline Service Co. v. Wilderness Society decision had not been rendered. As the award of attorneys' fees is now based upon a specific legislative response to Alyeska, it is clear that the present status of this matter is simply consistent with the state of the law at the time this action was initiated and litigated.

The legislative history of the Act makes it abundantly clear that it was always to apply to pending cases. The report of the House Judiciary Committee states:

"In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. (citations omitted)." (H.R.Rep. No. 94-1558, 94th Cong. Second Sess. 1976)

Furthermore, a review of the congressional record reveals that all U.S. House and Senate debates on this issue were in total agreement with this position. Specifically, see 122 Cong. Rec. H.12166 (October 1, 1976) which reveals that a motion in opposition to this position was soundly defeated. In addition, a large body of case law supporting this position has arisen in recent years. See Rosado v. Santiago, 562 F2d 114 (CA1, 1977); Seals v. Quarterly County Court, 562 F2d 390 (CA6, 1977); Wharton v. Knefel, 562 F2d 550 (CA8, 1977); Gates v. Collier, 559 F2d 241 (CA5, 1977); Gay Lib v. University of Missouri, 558 F2d 848 (CA8, 1977); Hodge v. Seiler, 558 F2d 284 (CA5, 1977).

## 2. NO SHOWING OF INDIVIDUAL FAULT OR BAD FAITH IS REQUIRED.

The fact that the district court did not find individual fault or bad faith on the part of the Petitioners during litigation is irrelevant. Alyeska was clearly inapplicable to situations involving bad faith (see Alyeska supra, at pages 258-259) and, in fact, Senator Abourezk stated that one of the functions of the Act was to eliminate the necessity, created by Alyeska, of adjudicating the good faith of the defendants. See 122 Cong. Rec. S. 17052 (1976). The holding in Johnson v. Georgia Highway Express, 488 F2d 714 (CA5, 1974) provides further support for this position in stating that not only violations of the constitution, but also effectuation of policies intertwined therewith merit awards of attorney's fees.

## 3. THE ACT MAY BE APPLIED TO LOCAL MUNICIPALITIES.

Further reference to the legislative history of the Act reveals that state and municipal governments and their agents are intended to come within its purview:

"Defendants in these cases are often state or local bodies or state or local officials. In such cases, it is intended that the attorney's fees, like other items of cost, will be collected either from the official in his official capacity or from funds of his agency or under his control, or from state or local government whether or not the agency or government is a named party." S.Rep. No. 94-1011, supra, at 5.

4. THE GRANTING OF CERTIORARI IN STANFORD DAILY V. ZURCHER IS NOT SIGNIFICANT.

The Ninth Circuit's decision in Stanford Daily v. Zurcher, supra, like the instant case, applied the Act to a case which was pending at the time of its enactment. There the similarity ends. In Stanford Daily the retroactivity issue was clearly overshadowed by other issues involving the application of the Fourth Amendment to police searches of parties who are not suspected of criminal activity. The Fourth Amendment issues involved in Stanford Daily are understandably of grave importance and appeared to be the basis for the granting of certiorari in that case. It is noteworthy, however, that the United States filed an amicus brief in Stanford Daily stating that if the decision of the lower court on the Fourth Amendment issues is upheld, the award of attorney's fees should likewise be upheld. In any event, the issue herein is exclusively concerned with the award of attorneys' fees and cannot, under any stretch of the imagination, be equated with the very significant Fourth Amendment issues involved in Stanford Daily.

CONCLUSION

For the foregoing reasons the Petition for Writ of  
Certiorari should be denied.

DATED: Honolulu, Hawaii, March 6, 1978

Respectfully submitted,



DENNIS W. POTTS \*  
Attorney for Respondent

\* Respondent's attorney wishes to acknowledge the invaluable time and assistance donated by John F. Schweigert, Esq. of Honolulu, Hawaii in the preparation of this response.

APPENDIX



DEPARTMENT OF THE CORPORATION COUNSEL  
**CITY AND COUNTY OF HONOLULU**  
HONOLULU, HAWAII 96813

Mr. Petts



BARRY CHUNG  
CORPORATION COUNSEL

June 27, 1977

The Honorable Justices of the  
United States Court of Appeals  
for the Ninth Circuit  
U.S. Court of Appeals and Post  
Office Bldg.  
7th & Mission Streets  
P. O. Box 547  
San Francisco, California 94101

Honorable Justices:

Re: NO. 75-3039, JAMES K. POKINI v.  
FRANK F. FASI et al.

During oral argument of the above-referenced case, on June 6, 1977, in the Federal Courthouse in Honolulu, the Court instructed the attorney for the Appellant to submit a letter addressing the propriety and amount of attorney's fees that could be awarded for his appellate services in the case. The Appellees were given an additional period of time in which they could address the same matters. This letter accordingly is in response to the Court's directive.

Attorney for Appellant has submitted an affidavit with his letter of June 14, 1977 setting forth his estimate of the time spent in preparing the appeal in this case and indicating his customary hourly fee. Appellees have no means of confirming or contesting the assertions contained in the affidavit, and accordingly are unable to comment meaningfully upon the matter. We therefore must rely upon the representations of Appellant's attorney as a brother lawyer and officer of the Court.

The Honorable Justices of  
the United States Court  
of Appeals for the Ninth  
Circuit

-2-

June 27, 1977

Before the Court by fiat excises perhaps \$8,500 from the pockets of the Appellees, we would take this opportunity to present the matters herein for the Court's further deliberation and consideration.

This case began as an action by Appellant, as a prisoner detained in the City and County jail, against the Mayor of the City and County of Honolulu, its Chief of Police, and the jail custodian; Appellant, James Pokini, was residing in the County jail after having been sentenced to the State Prison by a State Circuit Court Judge. Because of fears for his safety in the State Prison, he was being detained in the County jail. The litigation commenced as an effort by Appellant to contest his being segregated from the general jail population because of threats against him received after he was placed in the County jail. He was not placed in solitary confinement, but placed in an area of the jail which afforded him greater security and closer observation by jail custodial personnel. The reason for the segregation was explained to him and he acknowledged that he also was aware of threats made to his family. Visitation privileges for Appellant were ordered for the weekend of March 2, 1974, the only weekend he was segregated, and he was reassigned to a cell to share with another inmate on March 5, 1974. Because of his threats to kill the other inmate, he was assigned to a cell by himself, but with full privileges.

Notwithstanding the foregoing, the commencement of this litigation on February 28, 1974, did focus attention on the lack of written criteria by which prisoners were segregated from the general jail population. Such rules and regulations were drafted and promulgated as a result of the litigation. A stipulated judgment subsequently was entered into, at which time Appellees considered the litigation terminated, no consideration being given at the time to the matter of attorney's fees. After the entry of judgment, Appellant later moved for attorney's fees; the motion was denied by the trial court judge. This appeal followed.



June 27, 1977

At the hearing of the appeal on June 6, 1977, the comments received from the bench indicated an inclination on the part of the Court to award attorney's fees under the "Civil Rights Attorney's Fees Awards Act of 1976," P.L. 94-559, 90 Stat. 2641. That statute provides in pertinent part that the court [presumably meaning the trial court] may in its discretion allow the prevailing party a reasonable attorney's fee. The Appellees, of course, had no opportunity to argue to the trial court judge that they were the "prevailing party" within the meaning of the statute, inasmuch as the statute had not been enacted at the time of the trial court's hearing on Appellant's motion for attorney's fees. Moreover, the Appellees' Answering Brief had been filed in the Circuit Court on January 22, 1976, nine months prior to the enactment of the statute. Thus the argument in the Circuit Court of Appeals took place in a context in which the Appellees again had no opportunity to address the issue of who was the prevailing party in the trial court.

This action was framed under the provisions of 42 U.S.C. 1983. Because the case was settled, no evidence was received by the trial court and the record is totally silent as to whether the Mayor and Chief of Police participated in, had knowledge of, or were negligent with regard to the actions of the custodian of the jail that purportedly deprived the Appellant of federal rights, privileges or immunities under 42 U.S.C. 1983. Notwithstanding the absence of such necessary proof and notwithstanding a line of cases that would hold supervisory personnel liable only where such evidence was forthcoming, this Court apparently proposes to impose a form of strict liability upon the Mayor and Chief of Police by assessing against them the fees of an attorney who represented a prisoner, who by his own request, was returned to the very status, segregated confinement, which he had contested by precipitating this litigation. The imposition of attorney's fees under such circumstances is not equitable and is contrary to a large body of federal case law, as well as several hundred years of common law tradition holding supervisory public officers not strictly liable for the acts of their subordinates. We emphasize also that the record is totally devoid of any evidence that any of the Appellees deprived the Appellant of any "rights, privileges, or immunities secured by the Constitution and laws. . ." (42 U.S.C. 1983)

June 27, 1977

Under Hawaii law, if the Appellant were to sue the Appellees for money damages, he would be required to prove by clear and convincing evidence that the Appellees had acted maliciously and with an improper purpose. Orso v. City and County, 56 Hawaii 241, 534 P.2d 489 (1975); Medeiros v. Kondo, 55 Hawaii 499, 522 P.2d 269 (1974). Moreover, if the Appellees had been sued by the Appellant for money damages under 42 U.S.C. 1983, they also would have enjoyed under federal law a qualified immunity, the precise parameters of which apparently have not been determined. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 92 (1975), 43 L.Ed.2d 214; Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967), 18 L.Ed.2d 288. Thus, if Appellant had sought money damages from the Appellees, the Appellees would have had an opportunity to assert a qualified immunity under either state or federal law. Notwithstanding the immunity that the Appellees may have and the fact that they never have had an opportunity to assert these immunities, this Court expresses an inclination to award against the Appellees' expenses that are characterized as "costs" but that in fact are a form of damages.

In the case of Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the U.S. Supreme Court held that a municipal government is immune from a lawsuit under the provisions of 42 U.S.C. 1983. Moore v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), extended this principle to county governments. These two cases, in conjunction with Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), make it fairly clear that an award of attorney's fees under 42 U.S.C. 1983 that must be paid from city or county funds is not permissible. Emphasis to this position is supplied by the absence of the City and County of Honolulu as a party to this litigation. It accordingly is clear that any attorney's fees awarded in this case must be against the Appellees as individuals.

In summary, notwithstanding the fact that the Appellees never have had an opportunity to contest that Appellant was the "prevailing party" as defined in a statute enacted subsequent to the trial court's disposal of this case, and notwithstanding the fact that the Appellees as individuals



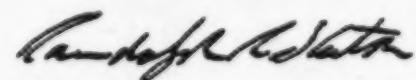
The Honorable Justices of  
the United States Court  
of Appeals for the Ninth  
Circuit

-5-

June 27, 1977

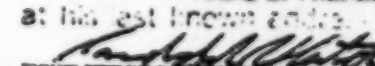
have been precluded from asserting their immunities because of their decision to settle this litigation, and notwithstanding the fact that no evidence ever has been introduced to establish that the Appellees Fasi or Keala participated in, had knowledge of, or were negligent with regard to any actions by the custodian of the jail, and notwithstanding a total absence of proof that Appellant ever was deprived of any right, privilege or immunity by any of the Appellees, this Court apparently proposes to extract from Appellees a rather sizable sum of money to reward Appellant's attorney for bringing this unnecessary litigation. Appellees suggest that under the circumstances no attorney's fee legally is warranted and, if this Court disagrees, that at a minimum, the case should be remanded to the trial court for consideration of the matters set forth in this letter that Appellees have not had an opportunity earlier to raise.

Respectfully submitted,



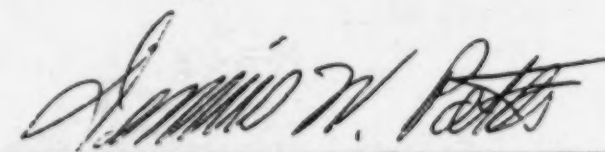
RANDOLPH R. SLATON  
Deputy Corporation Counsel

JER/RRS:jm

I hereby certify that a copy  
of the within was duly mailed  
on June 27, 1977  
to Dennis Potts  
Attorney for Appellant  
at his last known address.  
  
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondent's  
Response in Opposition to Petition for a Writ of Certiorari  
was mailed to RANDOLPH R. SLATON, ESQ., Deputy Corporation  
Counsel, City and County of Honolulu, Honolulu Hale, Honolulu,  
Hawaii 96813 on the 6 day of March, 1978.



DENNIS W. POTTS  
Attorney for Respondent

Supreme Court, U. S.  
**FILED**

**MAR 20 1978**

MICHAEL RODAK, JR., CLERK

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**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1977

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NO. 77-881

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FRANK F. FASI, Mayor, City and County of Honolulu,  
FRANCIS A. KEALA, Chief of Police, Honolulu Police  
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FRANCIS K. MATSUMOTO, Major, Honolulu Police  
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vs.

JAMES KAALAUkoa POKINI, aka James Akina, aka Poki,  
Respondent.

---

**PETITIONERS'**  
**REPLY**  
**MEMORANDUM**

---

BARRY CHUNG,  
Corporation Counsel  
JAMES E. ROSS,  
RANDOLPH R. SLATON,  
Deputies Corporation Counsel  
City and County of Honolulu  
Honolulu Hale  
Honolulu, Hawaii 96813  
Telephone: 808-523-4965  
Attorneys for Petitioners Fasi,  
Keala and Matsumoto

---

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# **In the Supreme Court**

OF THE  
**United States**

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OCTOBER TERM, 1977

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NO. 77-881

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FRANK F. FASI, Mayor, City and County of Honolulu,  
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vs.

JAMES KAALAU KOA POKINI, aka James Akina, aka Poki,  
Respondent.

---

**PETITIONERS'  
REPLY  
MEMORANDUM**

---



**1. RESPONDENT DOES NOT DISPUTE THE IMPORTANT AND SUBSTANTIAL CONSTITUTIONAL ISSUES INVOLVED IN THE PRESENT PETITION — THE RETROACTIVE APPLICATION OF ATTORNEY'S FEES DEPRIVES PETITIONERS OF THEIR RIGHTS TO DUE PROCESS UNDER THE CONSTITUTION BY IMPOSING UPON THEM A SEVERE PENALTY WITHOUT ANY OPPORTUNITY TO DEFEND AGAINST IT.**

Nowhere in his "Response in Opposition to Petition For a Writ of Certiorari" does Respondent dispute the position taken earlier by Petitioners that substantial constitutional questions are presented in the present Petition. On page 2 Respondent states that the first three reasons argued by Petitioners "have no place in the aforesaid petition." That argument by Respondent is grounded upon the fact that not until after oral argument before the Ninth Circuit Court of Appeals did Petitioners have any opportunity to present an argument in writing opposing the applicability of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Sec. 1988. Petitioners sought to do this through the only avenue available to them, and then sought to raise the arguments formally in the petition for rehearing.

Respondent's assertion that these arguments have no basis demonstrates the outrageous position in which Petitioners have found themselves, in which attorney's fees have been assessed against them when they have had no opportunity to contest these fees. Thus, as argued on page 5 of Petitioners' Petition, this conduct by the courts has deprived Petitioners of the due process of law guaranteed them under the Constitution.

**2. THE LEGISLATIVE HISTORY OF 42 U.S.C. SEC. 1988 SHOULD NOT BE RELIED UPON IN DETERMINING WHETHER THAT SECTION IS APPLICABLE TO THE INSTANT SUIT.**

Petitioners assert that "manifest injustice" would occur if

attorney's fees were assessed in the instant suit, and thus the retroactive application of 42 U.S.C. Sec. 1988 would be improper under *Bradley v. Richmond School Board*, 416 U.S. 696 (1973). To argue, as does Respondent, that the imposition of personal liability on individuals who have engaged in no wrongdoing is *not* manifestly unjust is to argue that Congress may be fiat impose any sort of penalty upon individuals who have not engaged in any wrongdoing, regardless of the nature of that penalty. The awarding of attorney's fees under these circumstances is as much a penalty as the awarding of punitive damages.

A perusal of the authority relied upon by Respondent in his assertions that retroactive application is proper demonstrates both the tortured posturing that must occur in order to sustain such a position, and also the internal inconsistency of his arguments. *Rosado v. Santiago*, 562 F.2d 114 (1st Cir. 1977), relied for its determination of retroactive application on *Martinez Rodriguez v. Jiminez*, 551 F.2d 877 (1st Cir. 1977), which relied for its determination of retroactive application on *Hutto v. Finney*, 548 F.2d 740 (8th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3261 (S.Ct. No. 76-1660, Oct. 18, 1977), and *Bradley v. Richmond School Board*, *supra*. The *Hutto* case recently has been argued before this Court and is now awaiting decision. 46 U.S.L.W. 3535 (Feb. 28, 1978). The *Bradley* decision does not provide support for the retroactive application of the award of attorney's fees for the reasons discussed in Petitioners' Petition and elsewhere in this Reply Memorandum. Each of the other five cases cited on page 4 of Respondent's Response also relies on the *Hutto* decision; or on *Bradley*; or on a case that relies on *Hutto* or *Bradley*; and the legislative history of 42 U.S.C. Sec. 1988.

Regardless of the facial validity of a law, the legislative history cannot validate an otherwise unconstitutional or illegal provision, or the illegal, improper and unconstitutional application of any given law that results in a substantive change in the rights of litigants, such as has occurred here in the retroactive application of attorney's fees. As this Court stated in another context in *Dobbett v. Florida*, 432 U.S. 232 (1977):

'[T]he constitutional provision [against passage of *ex post facto* laws] was intended to secure substantial personal rights against arbitrary and oppressive legislation... and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'  
[432 U.S. at \_\_\_\_; 53 L.Ed.2d at 356.]

Further, in *Procunier v. Navarette*, S. Ct. No. 76-446 (S.Ct., Feb. 22, 1978), 46 U.S.L.W. 4144 (Feb. 21, 1978), this Court ruled that prison officials were entitled to a qualified immunity of the type outlined in *Wood v. Strickland*, 420 U.S. 308 (1975), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Even in dissent, the Chief Justice stated that:

[O]ne who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim is not liable for damages under Sec. 1983. [46 U.S.L.W. at 4148 (Feb. 21, 1978).]

In the instant suit, not only was 42 U.S.C. Sec. 1988 passed after Petitioners were alleged to have acted improperly, but Petitioners were not even permitted to demonstrate that because of their good faith conduct they would not be liable for damages. This is particularly true for Petitioners Fasi and Keala who had no direct contact with the jail in question, and the record is void of any showing that either had any knowledge whatsoever of the operation of the jail.

### 3. THE ACT AS APPLIED TO LOCAL MUNICIPALITIES IS UNCONSTITUTIONAL.

The cryptic argument posed by Respondent, on page 5 of his Response, demonstrates the paradoxical nature of the retroactive application of 42 U.S.C. Sec. 1988 in this case. The legislative history quoted there demonstrates the complete lack of understanding by Congress of the relevant law in passing 42 U.S.C. Sec. 1988. This Court is well aware that under its holdings, municipalities cannot be sued under 42 U.S.C. Sec. 1983, the provision under which Respondent initially brought this action. Thus no costs whatsoever may be assessed municipalities under that provision, and to permit the collection of attorney's fees from Petitioners simply because of their

official positions allows Respondent to thwart the earlier holdings of this Court *sub silentio*.

### 4. CERTIORARI SHOULD BE GRANTED SINCE THE AUTHORITY UPON WHICH THIS CASE WAS DECIDED HAS BEEN DRAWN INTO QUESTION.

The case relied upon by the Ninth Circuit in ruling against Petitioners, *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977), *cert. granted*, 76-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3, 1977), has been argued before this Court on January 17, 1978. 46 U.S.L.W. 3468 (Jan. 24, 1978). Moreover, *Hutto v. Finney*, *supra*, which was relied upon by other lower courts for the retroactive award of attorney's fees, also has been argued before this Court, as noted, *supra*. The incongruity posed by Respondent in asking this Court not to review the instant decision when the authority for that decision already is under review by this Court cannot be surpassed. Review is necessary in order to prevent any further injustice to Petitioners.

### CONCLUSION

For the foregoing reasons and authority, the Petition for Writ of Certiorari should be granted.

DATED at Honolulu, Hawaii: March 9, 1978.

Respectfully submitted,

BARRY CHUNG,  
Corporation Counsel

JAMES E. ROSS,  
RANDOLPH R. SLATON  
Deputies Corporation Counsel  
Counsel for Petitioners